Supreme Court, U.S.
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1995 MAY 19 1995
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

JOAQUIN OSVALDO GALLO-CHAMORRO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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65pp

QUESTIONS PRESENTED

1. Did the trial court violate the international extradition agreement by which the United States obtained custody of the defendant from the country of Colombia and in which agreement the country of Colombia expressly forbade prosecution of the defendant pursuant to 18 United States Code Section 2, when the trial judge instructed the jury at the Government's request that the jury could convict the defendant pursuant to the doctrine of vicarious liability stated in *Pinkerton v. United States*, 328 U.S. 640 (1946)?

2. Does the *Pinkerton* doctrine of substantive criminal liability, as established in *Pinkerton v. United States*, 328 U.S. 640 (1946), depend on the act of Congress contained in 18 United States Code Section 2 for its validity?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Joaquin Osvaldo Gallo-Chamorro, petitions this court to review the judgment and opinion of the United States Court Of Appeals, Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is published at 48 F.3d 502. That opinion is reproduced in its entirety in the appendix to this petition.

BASIS FOR JURISDICTION

The opinion of the lower appellate court was filed on March 23, 1995.

This Court has jurisdiction to review a decision of a United States Court of Appeals pursuant to 28 United States Code Section 1254.

STATUTORY PROVISION INVOLVED

18 United States Code Section 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

STATEMENT OF THE CASE

This is a federal criminal case involving the international extradition of the petitioner, Mr. Gallo-Chamorro, from the country of Colombia. The United States District Court for the Southern District of Florida acquired subject matter jurisdiction pursuant to 18 United States Code Section 3231. Following his conviction, petitioner Gallo-Chamorro took a direct appeal to the United States Court of Appeals for the Eleventh Circuit, utilizing 28 United States Code Section 1291 as the basis for appellate court jurisdiction.

1. The Extradition.

The United States Government obtained two separate indictments against Mr. Gallo-Chamorro, both of which

charged the commission of several drug crimes. One of the indictments was returned in the year 1988 and charged Mr. Gallo-Chamorro with committing three drug crimes during the year 1988. The second indictment, which charged eight additional drug crimes, was filed in the year 1989. One of the alleged crimes in this second indictment was a drug conspiracy that encompassed the years 1982 through April of 1988. The remaining seven crimes stemming from this second prosecution charged substantive drug crimes that were committed in the year 1987.

Mr. Gallo-Chamorro, hereafter "Gallo," was captured in the country of Colombia. In the year 1990, this defendant was extradited to the United States at the request of our Government. The Colombian document, upon which the Government of the United States of America received custody of Mr. Gallo, imposed several limitations upon Mr. Gallo's prosecution.[1] Colombia only permitted the United States to try Mr. Gallo for a total of five crimes. Of the charges contained in the first indictment, Colombia permitted Mr. Gallo to be tried for the crime of importation. Of the charges contained in the second indictment, Colombia permitted Mr. Gallo to be prosecuted on one charge of conspiracy and for three different distribution

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[1] This extradition document was issued by the Colombian government on September 5, 1990. The lower courts used an English translation of that document, which was obtained from a person certified by the Administrative Office of the United States Courts. That English translation, in its entirety, is contained in the appendix to this petition.

crimes. As to all four of the substantive crimes, the indictment alleged not only a violation of a substantive criminal statute, but also that the criminal acts were done "in violation of . . . Title 18, United States Code, Section 2."[2] Of all of crimes for which extradition was granted, only the conspiracy count contained no reference to 18 United States Code Section 2.

In pertinent part, the Colombian Government expressly stated in the extradition document: "The [Colombian] Supreme Court of Justice has stated, . . . , that the violation of Title 18, Section 2, of the United States Code does not have an equivalent in Colombia, so therefore the extradition shall not be authorized, either, on account of this definition." Finally, Mr. Gallo's maximum sentence was limited to thirty years of imprisonment.

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[2] Colombia extradited Mr. Gallo on count three of the superseding indictment filed in United States District Court for the Southern District of Florida case number 88-301-Cr-KEHOE. That count of the indictment expressly states that the acts of importation of cocaine were "[a]ll in violation of Title 21, United States Code, Sections 952(a) and 960(a)(1) and Title 18, United States Code, Section 2."

Colombia extradited Mr. Gallo on counts one, three, five and seven of the superseding indictment filed in United States District Court for the Southern District of Florida case number 88-8125-Cr-PAINE. Count one, the conspiracy count, charged that those criminal acts were committed "[a]ll in violation of Title 21, United States Code, Section 846." The other three counts alleged distribution of cocaine on three different dates. Each of those three counts alleged that the distribution of the cocaine was accomplished "in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2."

Both indictments were consolidated for the purpose of a single trial. Prior to that trial, defense counsel filed a motion to enforce the above-quoted provision of the extradition agreement and prevent the Government from prosecuting Mr. Gallo by utilizing 18 United States Code Section 2. In response, the Government asserted that it had a right to a jury instruction under the doctrine established in *Pinkerton v. United States*, 328 U.S. 640 (1946).

At the start of the trial, the judge granted the defense motion to enforce the agreement. Also at that time, defense counsel filed a diplomatic note from the Government of Colombia to the United States State Department reaffirming that nation's desire to have the above-quoted prohibition enforced.[3] The trial judge indicated that he was inclined to deny the Government's request for a *Pinkerton* instruction, but reserved ruling until the charge conference.

2. The Trial Testimony.

Succinctly stated, the Government presented the following testimony as a basis to convict Mr. Gallo of all of the crimes for which he was being tried.

Since 1983, Mr. DeMarco was involved in selling cocaine in the area of Chicago, Illinois. This person met Mr. Gallo in the year 1984. Twice in 1984, Mr. DeMarco picked up cocaine from Mr. Gallo at the latter's home.

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[3] This diplomatic note is reproduced in the appendix to this petition.

Mr. Ornelas began warehousing loads of cocaine in the year 1987. Mr. Ornelas had known Mr. Gallo since approximately 1980. Mr. Ornelas picked up his cocaine from a person, who was named Mendoza, while at offices owned or leased by Mr. Gallo. Mr. Ornelas "assumed the cocaine was [Mr.] Gallo's," based on statements from Mendoza. In the year 1987, Mr. Ornelas warehoused four different loads of cocaine. Mr. Gallo was one of several persons with whom Mr. Ornelas met. Mr. Gallo was present, when Ornelas arrived at the stash house with the cocaine, which was stored there. Mr. Gallo was also present when the cocaine was loaded into cars. Gallo knew to whom the cocaine was to be delivered and determined who was to drive it. Mr. Ornelas testified that on an unspecified date "Jackie and another person, Jack Cor[e]y, delivered one of the loads" to a stash house and that Ornelas and Gallo took the cocaine out of the vehicle and brought it into the house. Otherwise, Mr. Gallo was not mentioned as a driver of any of the cars that transported cocaine. Mr. Ornelas was paid in cocaine for his assistance, which cocaine Mr. Ornelas, himself, sold for a profit. Ornelas was arrested in December of 1987, following delivery of the last load with which he was involved.

Mr. Mendoza knew Mr. Gallo for several years and was involved with Mr. Gallo, when distributing cocaine with Mr. DeMarco in Illinois during the year 1983. In 1986 and prior to mid-1987, Mendoza teamed up with Mr. Gallo and Mr. Ornelas to deal drugs out of Mr. Gallo's business. Mendoza was paid in cocaine, which he acquired from Gallo. Mr. Mendoza did not testify to dates in the year of 1987, with one exception of reference to Mr.

Gallo allowing him to take ten kilos of cocaine around December of 1987.

Mr. Corey was involved with Mr. Gallo in four cocaine importations in the year 1987. Mr. Corey could not remember the specific time frame during 1987. Gallo sent Corey to the Bahamas to supervise the importations. Generally, Gallo paid Corey in cash. Once at an unspecified date in 1987, Corey received six kilos of cocaine from Gallo. Once, Gallo drove a load of cocaine to the stash house with Corey riding along.

Mr. Olson was also associated with Defendant Gallo in several importations of cocaine into Florida from the Bahamas during the year 1987. Olson was never present at the stash house. Olson never testified that Mr. Gallo touched the cocaine, which he brought into the United States.

According to the testimony, Mr. Gallo was one of several people, who arranged for a confidential informant to fly cocaine from the country of Colombia into the United States. That pilot testified that Mr. Gallo was not on the plane, when he flew to Colombia and back to Miami, Florida with this load of contraband on April 21 and 22, 1988. The Government established that Defendant Gallo was arrested and placed in jail in Miami, Florida for the crime of driving under the influence of alcohol, when this cocaine was flown into Florida.

3. The Breach Of The Extradition Agreement.

As noted earlier, the trial judge granted Mr. Gallo's motion to enforce the extradition agreement. A redacted

indictment was prepared for the jury, in which document all reference to 18 United States Code Section 2 was deleted.

In further compliance with his earlier ruling, the trial judge ultimately did not give a standard jury instruction authorizing any conviction on the standard theory that Mr. Gallo had aided and abetted another's criminal acts. However, the prosecution had filed a formal request for a *Pinkerton* instruction, by which the Government requested that the jury be instructed that Mr. Gallo could be held vicariously liable on the count charging illegal importation through employment of that doctrine.

After the Government rested, the defense moved for a judgment of acquittal on the importation count, because the evidence established that Mr. Gallo did not import the cocaine and could not be convicted of that crime as an aider and abettor. Contrary to its earlier indication, the trial court responded that Mr. Gallo could be convicted under a *Pinkerton* instruction. The trial judge then ruled that he would give the Government's requested instruction. Mr. Gallo's attorney unsuccessfully argued that the Government was circumventing the extradition agreement, because *Pinkerton* was "nothing more than an extension of common law liability of aiding and abetting." The trial judge stated: "I don't agree that they are the same. Aiding and abetting is not the same as conspiracy, and *Pinkerton* is based on conspiracy. I think there is a distinction there. I will deny the objection to the *Pinkerton* charge."

During closing argument, defense counsel argued that Mr. Gallo could not be convicted as an aider and

abettor, regarding any of the substantive counts. The prosecutor responded by asserting that conviction for importation could rest on the *Pinkerton* instruction.

The trial judge gave a *Pinkerton* instruction to the jury, limiting the application of that instruction to the importation count.[4]

On the next day, the jury asked whether the *Pinkerton* doctrine could also apply to the other substantive counts. The trial judge overruled Mr. Gallo's protest and reinstructed the jury that *Pinkerton* liability could apply to *all* of the substantive charges. Within forty-five minutes, the jury returned with guilty verdicts on *all* of the substantive charges. The jury acquitted Mr. Gallo of the conspiracy charge.

In his motion for a new trial, defense counsel asserted that this reinstruction violated the extradition agreement.

At the start of Mr. Gallo's sentencing proceeding, defense counsel unsuccessfully objected to the sentencing on the basis that the Colombian Embassy in Washington, D.C. had lodged a formal protest that the extradition agreement had been violated because the trial court gave a *Pinkerton* jury instruction in this case. Defense counsel advised the trial judge that Mr. Gallo would file a copy of that diplomatic note, when he obtained a copy. A copy of that diplomatic note was ultimately filed with the trial

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[4] That portion of the jury instructions is contained in the appendix to this petition.

court.[5] Restating that it had barred a prosecution under an aiding and abetting theory, the Government of Colombia told the State Department:

> Notwithstanding the clear mandate of Resolution 235, the trial judge, . . . instructed the jury that it could find Mr. Gallo Chamorro guilty of the substantive offenses charged in the indictment under the "Pinkerton" theory of criminal liability. The Pinkerton theory, which is wholly vicarious in nature, is not recognized by Colombia since, like 18 U.S.C. Section 2, it has no comparable legal concept in the Colombian Criminal Code.
>
> By instructing the jury that it could find Mr. Gallo-Chamorro guilty of the substantive crimes charged under a theory of vicarious criminal liability, not recognized by Colombia, the trial judge violated the extradition Resolution, and other principles of international law.

Mr. Gallo was sentenced to a term of 360 months, i.e. 30 years, imprisonment on each count for which he was convicted, each of those sentences to be served concurrently. Upon release from prison, Mr. Gallo was to receive five years of supervised release. A $ 50.00 special assessment was imposed on each count for a total of $ 200.00.

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[5] This second diplomatic note is reproduced in its entirety in the appendix to this petition. That note to the State Department was prepared eleven days before the sentencing, although a copy was not filed with the trial court until seven days after sentencing.

On appeal, Mr. Gallo raised only one issue. Mr. Gallo argued that the giving of the *Pinkerton* instruction violated an expressed provision of the extradition agreement and permitted the jury to convict Mr. Gallo in contravention of that agreement. Regarding the importation charge, the facts unequivocally established that Mr. Gallo did not physically import the cocaine, himself. In his brief, Mr. Gallo conceded that he could not directly challenge the sufficiency of the evidence to support the four distribution crimes, because the Eleventh Circuit "has interpreted distribution broadly, so that it includes actions which were traditionally considered aiding and abetting. *United States v. Catchings*, 922 F.2d 777 (11th Cir. 1991)." Mr. Gallo did note that there were not four separate instances where Mr. Gallo, himself, delivered more than five kilos of cocaine with his own hands. Consequently, Mr. Gallo took the position that the *Pinkerton* instruction, if in violation of the agreement, tainted all of the convictions.

The lower appellate court rejected Mr. Gallo's position. That court's decisive legal ruling was that "criminal liability for aiding and abetting under 18 U.S.C. § 2 is not the same as coconspirator liability under *Pinkerton*."[6] That lower court also held that international extradition agreements did not authorize another nation's "intrusion into the evidentiary or procedural rules of the [United States.]"

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[6] In a footnote in his brief, Mr. Gallo asserted that Colombia was really asserting the concept of dual criminality, rather than the concept of the rule of specialty. However, Mr. Gallo asserted that "[a]ny misuse of labeling does not detract from the substance of what was argued [in the trial court], namely that [the *Pinkerton*] instruction violated the agreement."

REASONS FOR GRANTING THE PETITION

Almost fifty years ago, this Court decided *Pinkerton v. United States*, 328 U.S. 640 (1946). In that decision, this Court established a theory of vicarious liability that permitted conviction of a person for a substantive crime, even though that particular person did not directly participate in the commission of the substantive offense. This Court held that all that was necessary for conviction was the fact that the defendant and the person who actually committed the crime were both members of a conspiracy and that this substantive crime was committed in furtherance of that conspiracy. *Id.* 328 U.S. at 645, 647.

The concept espoused in that case has become known as the *Pinkerton* doctrine.[7] It is a core concept utilized in federal criminal prosecutions of all kinds. Petitioner Gallo presented the lower courts with what was thought to be a simple question upon which only one answer could be given. What is the true source of this doctrine? The answer to that question, which the lower courts gave, highlights the need for this Court to reeducate the lower federal courts about a fundamental long-unmentioned concept about the creation of substantive federal criminal law under our constitutional system of government.

One of the earliest decisions of this Court established a cornerstone principle of federal constitutional law regarding the separation of powers of two of the three

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[7] Although purely coincidental, it is interesting to note that the *Pinkerton* case came from Alabama, then within the old Fifth Circuit and now within the Eleventh Circuit that decided this case.

branches of government in the area of federal criminal law. *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812) held that the legislative authority of the United States must first make an act a crime and that federal courts lack implied power to exercise common law jurisdiction in criminal cases. Elaborating on that basic constitutionally-derived principle, this Court stated: "The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Morissette v. United States*, 342 U.S. 246 at 263 (1952).

One must assume that the Supreme Court of the United States knew, understood, and followed that particular concept of the separation of powers doctrine when it decided *Pinkerton v. United States*, 328 U.S. 640 (1946). However, nowhere in the *Pinkerton* opinion did this Court state what statute formed the legislative source for the *Pinkerton* doctrine. As a consequence, it has become apparent that legal scholars, lawyers and other courts assume that the Supreme Court of the United States, itself, – not a statute – is the source of the *Pinkerton* doctrine. Said in different words, *Pinkerton* is treated as a federal common law creation of this Court.

Indeed, casual research suggests that *Pinkerton* has taken on a life of its own, disconnected from any statutory source. One leading treatise on substantive criminal law categorizes the *Pinkerton* doctrine as a variant of accomplice liability. That treatise notes that the *Pinkerton* doctrine appears to have been included within some state statutes defining accomplice liability. However, nowhere

in its discussion does that treatise suggest a federal statutory source for the *Pinkerton* rule. W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 6.8(a) (West Criminal Practice Series 1986). A treatise on criminal conspiracy likewise fails to ascribe a statutory source to the *Pinkerton* doctrine. P. Marcus, *Prosecution and Defense of Criminal Conspiracy Cases* § 7.03 (Mathew Bender 1994).

Petitioner Gallo presented the lower appellate court with a concise and irrefutable argument that 18 United States Code Section 2 is the *only* statute that breathes life into the *Pinkerton* doctrine.

Authoring *Pinkerton*, Justice Douglas wrote: "The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle." *Pinkerton v. United States*, 328 U.S. at 647. While broader in verbiage, 18 United States Code Section 2 reads: "Whoever commits an offense against the United States or aids, abets, *counsels, commands,* induces or *procures* its commission, is punishable as a principal."[8]

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[8] The number of the present statute, 18 United States Code Section 2(a), was assigned in the year 1948, when the federal criminal laws were last codified. At the time of the *Pinkerton* decision, that statute was numbered 18 United States Code Section 550. The wording of that earlier version is materially identical to the wording of the present statute. The Revision Notes to the present version state: "Section 2(a) comprises section 550 of title 18, U.S.C., 1940 ed., without change except in minor matters of phraseology."

The next subsection, 18 United States Code Section 2(b), was added in the year 1951. The Revision Notes to that statute indicate no connection between that amendment and the *Pinkerton* decision.

In the brief on the merits filed on behalf of the United States in *Pinkerton,* itself, the Solicitor General of the United States represented to this Court:

> The cases are legion where a party to a conspiracy to commit a crime has been held criminally responsible for the commission by another of the objective offense or of an offense which is the natural consequence of the conspiracy if he was a party to the conspiracy at the time of the commission of the offense. His responsibility rests *not* upon any principle peculiar to the law of criminal conspiracy, as such, but upon the rule, which no one doubts, that a person who counsels, procures, or commands another to commit a crime is himself also guilty of the crime[33] because natural reason and elementary principles of causation so demand.

> 33. *In this aspect the principle is embodied in the aider and abettor statute* (sec. 332 of the Criminal Code, 18 U.S.C. 550), which provides:
>
> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." * * *

Pinkerton v. United States, S.Ct. Case No. 719 Brief for the United States at pages 39-40 (emphasis added).

The lower appellate court granted Mr. Gallo's motion to have that court take judicial notice of this brief, which

brief was filed with that motion.[9] Petitioner cited *Kinsella v. United States*, 361 U.S. 235 at 242 (1960) as authority for the lower court to consult the Government's *Pinkerton* brief, when interpreting this Court's opinion in *Pinkerton*. Nevertheless, the lower appellate court ignored this solemn representation of the Office of the Solicitor General, with which it had been presented. Concededly, changes in policy or a mistake could permit the United States of America to alter a position it previously took before this Court. That has no applicability here. Fifty years ago the Solicitor General made no mistake in his understanding of both substantive criminal law theory and the concept of separation of powers. *Compare Garcia v. United States*, 469 U.S. 70 at 78-79 (1984).

Subsequent to the opinion filed by this Court in the *Pinkerton* case, Congress never enacted a statute containing in any form the wording of the *Pinkerton* doctrine.[10] It

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[9] That order was entered on March 29, 1994. Petitioner Gallo filed copies of four legal documents, that had been filed in this Court in *Pinkerton;* namely, the Petition, the Brief for Petitioners, the Memorandum For United States and the Brief for the United States.

In the lower court, petitioner Gallo quoted the Government's summary of this portion of the United States' brief, which was contained on page 21. At oral argument, defense counsel referred that court to the lengthier above-quoted portion from that brief.

[10] The wording of the general conspiracy statute upon which the *Pinkerton* case was litigated, i.e. then 18 U.S.C. § 88 and now, as subsequently amended, 18 U.S.C. § 371, has nothing that can be construed as the statutory source of the *Pinkerton* doctrine. Likewise, the *Pinkerton* doctrine cannot be read anywhere within the later-

follows that the only statutory source for that doctrine remains the same one that the Solicitor General cited to this Court in *Pinkerton*.

The opinion below never solves the mystery. It never explains what statute is the Congressional basis for the *Pinkerton* doctrine. The lower court deftly avoided naming that statute by citing this Court's statement in *Nye & Nissen v. United States*, 336 U.S. 613 (1949) that the concept of aiding and abetting has a broader application than the *Pinkerton* doctrine and that the *Pinkerton* doctrine is narrower in scope.[11] *Id.* 336 U.S. at 620. That is a truism discernable from the superimposing of the wording of the previously quoted portion of the *Pinkerton* opinion upon the wording of 18 United States Code Section 2(a). *Pinkerton* encompasses the words "counsels, hires and procures," leaving alone the words "aids, abets, commands, and induces." However, reliance on that portion of *Nye & Nissen* begs the question that was before the lower courts. What is the statutory source of the *Pinkerton* doctrine?

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enacted drug conspiracy statute, 21 U.S.C. § 846, the violation with which petitioner Gallo was charged.

The *Pinkerton* decision never involved a construction of the federal conspiracy statute. The decisive issue before this Court in *Pinkerton* was never whether the defendant was guilty of the crime of conspiracy.

[11] It is important to note that both the opinion in *Pinkerton* and the opinion in *Nye & Nissen* were written by the same person, Justice Douglas, and only three years apart. Consequently, the two opinions were not accidentally inconsistent. Moreover, there was no change in theory on the part of this Court.

The international extradition law aspects of this case also provide additional reasons for this Court to review the lower court's decision.

In *United States v. Alvarez-Machain*, ___ U.S. ___, 112 S.Ct. 2188 (1992) this Court held that the Government of the United States could prosecute a defendant, whom it kidnapped in a foreign country and brought to the United States, because the extradition treaty between the United States and Mexico did not contain a written provision dealing with the issue of kidnapping. Mr. Gallo's case stands in marked contrast to *Alvarez-Machain* and presents this Court with an opportunity to signal to both other nations and the lower federal courts that it does not sanction international lawless behavior by the Executive Branch of this Government predicated on an arrogance of power.

In this case, the United States of America took custody of petitioner Gallo with full knowledge of the expressed provision of the extradition agreement at issue here. Reduced to its essence, this litigation is a simple case of a breach of the contract entered into by two nations. The lower court's reasoning attempted to confine the issue to the international extradition concepts of the doctrine of specialty and the doctrine of dual criminality. Petitioner Gallo asserted below that the substance of his claim was that the agreement, itself, was breached. This case permits clarification of whether those two doctrines are the only means by which an extradited defendant can contest his prosecution.

If the petition is granted in this case, this Court will have an opportunity to clarify the scope of the inquiry

into a claimed violation of an international extradition agreement. The lower court suggests that there are questions as to why Colombia extradited petitioner Gallo and why Colombia imposed the limitation on prosecution that is at issue here. The lower appellate court put the onus of clarification on the prisoner, petitioner Gallo. That court's opinion suggests that Mr. Gallo bore a burden of proving at the trial level after his extradition *why* the country of Colombia imposed a limitation on his surrender before Colombia transferred custody over Mr. Gallo. That was legal error. Mr. Gallo was not one of the contracting parties. Rather, he was the subject of the contract. Had the representatives of the United States of America not understood the pertinent language of this extradition agreement that the country of Colombia chose to insert *or* had the prosecution desired to eliminate that wording from the document *or* had this Country's officials questioned the status of the substantive criminal law of the country of Colombia *or* had the United States decided that it did not want to honor that provision in the then-proposed agreement, the time for the United States of America to speak was *before* the United States of America took custody of Mr. Gallo pursuant to that agreement. After that transfer, there should have been no inquiry at all as to why Colombia did what it did.

Possibly fueled by a message it obtained from this Court's decision in *Alvarez-Machain,* the lower appellate court suggested that Colombia's diplomatic notes containing Colombia's interpretation of its own law were irrelevant. *See United States v. Alvarez-Machain,* ___ U.S. ___ at ___, 112 S.Ct. 2188 at 2196 (1992). That holding of the lower court supports the granting of review by this

Court. This is a strange holding for several reasons. First, the requested state retains an interest in the fate of a person whom it has extradited, so that a violation of the extradition agreement violates the rights of the requested nation, as well as those of the person. 1 *Restatement (Third) Of The Foreign Relations Law Of The United States,* Extradition Introductory Note at page 557-558 (1987). Second, the signatory to this agreement was the country of Colombia, which country was the one clarifying what it had said in the agreement about its law.[12]

Finally, the lower court's opinion can be read as suggesting that the content of a jury instruction could not be a basis for finding a violation of an international extradition agreement, because the requisitioning nation's evidentiary and procedural rules are sacrosanct. Apparently, the lower court focused on a conflict of laws principle that the evidentiary and procedural laws of the forum control. Here, however, the *Pinkerton* instruction addressed a matter of substance in the agreement. That agreement had the force of law in the courts of this Country. *Cf. Weinberger v. Rossi,* 456 U.S. 25 at 29-30 (1982). Because the jury instruction involved an aspect of that agreement and because the agreement should have controlled, the lower court misapplied conflict of laws theory to the situation before it. *Cf. Pritchard v. Norton,* 106 U.S. 124 at 129-130, 135-136 (1882). Consequently, the

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[12] The timing of the sending of the second diplomatic note cannot be criticized. It was not until the middle of trial that the trial court ruled that it would give the *Pinkerton* instruction. The country of Colombia had every right to believe that the United States of America would comply with the agreement.

validity, applicability and scope of the conflict of laws principle used by the Eleventh Circuit to immunize the trial judge's action are important areas to elucidate in the context of international extradition.

CONCLUSION

For the above-stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Joaquin Osvaldo GALLO-CHAMORRO,
Defendant-Appellant.

Nos. 91-5949, 92-4003.

United States Court of Appeals,
Eleventh Circuit.

March 23, 1995.

Defendant, a foreign national, was extradited to United States from Colombia pursuant to Resolution by Colombian Ministry of Justice on charges of importation of cocaine, conspiracy to distribute cocaine, and distribution of cocaine only. Defendant was convicted in the United States District Court for the Southern District of Florida, Nos. 88-301-CR-JCP and 88-8125-CR-JCP, James C. Paine, J., of substantive offenses and acquitted of conspiracy charge. Defendant appealed. The Court of Appeals, Fay, Senior Circuit Judge, held that: (1) *Pinkerton* coconspirator liability instruction did not violate doctrine of specialty, and (2) issue whether coconspirator liability violated concept of dual criminality was waived.

Affirmed.

Appeals from the United States District Court for the Southern District of Florida.

Before KRAVITCH and CARNES, Circuit Judges, and FAY, Senior Circuit Judge.

FAY, Senior Circuit Judge:

In this appeal the Defendant contends that a jury instruction on co-conspirator liability based on *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), violated the terms of an extradition agreement between the United States' and Colombian governments which prohibited the use of 18 U.S.C. § 2, an aiding and abetting statute, in trying the Defendant. Under *Pinkerton* each member of a conspiracy is criminally liable for all reasonably foreseeable crimes committed during the course and in furtherance of the conspiracy. Because criminal liability based on the *Pinkerton* jury instruction does not equate to criminal liability for aiding and abetting under 18 U.S.C. § 2, we find that the district court complied with the terms of the extradition agreement and AFFIRM.

I. BACKGROUND

The Defendant, Joaquin Osvaldo Gallo-Chamorro ("Gallo"), a Colombian national, was arrested in Bogota, Colombia, on January 9, 1990. On January 11, 1990, the United States requested Gallo's provisional arrest. Two months later the United States submitted Diplomatic Note 206 to the Republic of Colombia ("Colombia"), requesting Gallo's extradition to the United States to stand trial for several narcotics trafficking crimes, including violations of 18 U.S.C. § 2, an aiding and abetting statute. The United States requested Gallo's extradition in

accordance with Colombia's Decree Number 1860 of 1989.[1]

On September 5, 1990, the Colombian government by resolution extradited the Defendant to the United States for trial on one count of importation of cocaine in violation of sections 952(a) and 960(a)(1) of Title 21 of the United States Code, one count of conspiracy to distribute cocaine in violation of section 846 of Title 21 of the United States Code, and three counts of distribution of cocaine in violation of section 841(a)(1) of Title 21 of the United States Code. The extradition document, Resolution Number 235 of the Colombian Ministry of Justice, denied extradition of Gallo on all other counts and stated that "[t]he [Colombian] Supreme Court of Justice has manifested on several occasions that the violation of Title 18, Section 2, of the United States Code does not has [sic] its

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[1] The United States and Colombia entered into an extradition treaty on September 14, 1979. Colombia ratified the treaty by its Law 27 of 1980, and the United States ratified the treaty on November 20, 1981. In 1986, the Colombian Supreme Court held that Law 27 was unconstitutional because it had been sanctioned by a Colombian government official other than the President of Colombia. Because of this ruling, the treaty remains inapplicable in Colombia. 1SR3-330-1-4. However, in 1989, the President of Colombia, pursuant to his martial law powers, issued Decree Number 1860 which provides in pertinent part that "for the purpose of extradition of Colombian and foreign nationals sought for [narcotics trafficking and related] offenses, the procedure set forth in the Code of Criminal Procedure shall be applied, with the modifications set forth herein." *Id.* The issuance of this decree suspended Colombia's requirement that Colombian nationals be extradited only pursuant to public treaties. *Id.*

equivalent in Colombia, and therefore it does not authorize, either, the extradition for this concept." Section 2 of Title 18 of the United States Code reads as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (1969). The resolution also specified that, if extradited and convicted, Gallo must not be sentenced to prison for more than thirty years.

Prior to trial, Gallo filed a Motion to Enforce Rule of Specialty, arguing that he could not be prosecuted under 18 U.S.C. § 2 according to the extradition papers and the specialty doctrine. The specialty doctrine is a principle of international law that stands for the proposition that

> the requesting state, which secures the surrender of a person, can prosecute that person only for the offense for which he or she was surrendered by the requested state or else must allow that person an opportunity to leave the prosecuting state to which he or she had been surrendered.

United States v. Herbage, 850 F.2d 1463, 1465 (11th Cir.1988), *cert. denied*, 489 U.S. 1027, 109 S.Ct. 1158, 103 L.Ed.2d 217 (1989) (citations omitted). The government responded that the doctrine of specialty is not applicable to a statute such as 18 U.S.C. § 2, which does not create a substantive offense. Alternatively, the government

argued that it was entitled to a jury instruction pursuant to *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). In *Pinkerton*, the Supreme Court held that a co-conspirator could be guilty of a substantive offense even though he did no more than join the conspiracy, provided that the offense was reasonably foreseeable and was committed in furtherance of the conspiracy. *Pinkerton*, 328 U.S. at 647-48, 66 S.Ct. at 1184; *see also Nye & Nissen v. United States*, 336 U.S. 613, 618, 69 S.Ct. 766, 769, 93 L.Ed. 919 (1949). Instructing juries on this concept has come to be known as a "*Pinkerton* instruction."

The district court granted Gallo's motion regarding 18 U.S.C. § 2 and, in compliance with the specialty doctrine, omitted 18 U.S.C. § 2 from all counts in the redacted indictment submitted to the jury and did not include the standard aiding and abetting instruction when it charged the jury. The district court deferred ruling on the *Pinkerton* issue until the conclusion of the trial.

We find it unnecessary here to reiterate the extensive evidence presented at trial, but suffice it to say that the record is clearly sufficient to support the jury verdicts.

At the close of the evidence, the government submitted a request for a *Pinkerton* instruction as to the importation count, contending that the instruction would not violate the specialty doctrine because its application would not result in Gallo being tried for any offense other than those for which he had been extradited.[2] Gallo

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[2] Additionally, the government argued that Colombia had extradited Gallo on the importation count knowing that someone other than Gallo had actually transported the cocaine into

responded that Colombia had extradited him to be tried only as a principal, not as an aider and abettor, and that the *Pinkerton* instruction is a "constructive theory of liability" to which Colombia would have objected.[3] R10-1211-13, 1216. The district court was not persuaded by Gallo's argument that aiding and abetting is the same as co-conspirator liability under *Pinkerton*. The court stated that "[a]iding and abetting is not the same as conspiracy, and *Pinkerton* is based on conspiracy. I think there is a distinction there." R10-1216.

The district court overruled Gallo's objection to the *Pinkerton* charge.[4] The jury was instructed on the theory of co-conspirator liability under *Pinkerton* as to the importation count only.[5] During its deliberations, the jury

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the United States, thereby recognizing the concept of vicarious criminal liability embodied in *Pinkerton*.

[3] Responding to the government's claim that Colombia extradited Gallo for importation, knowing based on the facts that Gallo was only vicariously liable for that count, Gallo's attorney argued that "the Government of Colombia does have, as all the other countries do have statutes in the book that would prohibit the action complained of by the Government against Mr. Gallo, importation. It is accessory before the fact, and accessory after the fact if you aid and abet. He (Gallo) wasn't charged with that. He came here as a principal."

[4] The district court had also previously denied Gallo's motion for judgment of acquittal on the importation count, holding that the evidence against Gallo on that charge was sufficient under *Pinkerton*.

[5] The *Pinkerton* instruction read in pertinent part:

> [A] Defendant found guilty of a conspiracy offense may be found guilty of a substantive count even though he, the Defendant, did not participate in the importation of cocaine. The reason for this is that

inquired whether the *Pinkerton* instruction applied only to the importation count or to all counts. Over Gallo's objection, the district court instructed the jury that the *Pinkerton* instruction applied to the three distribution counts as well.

The jury convicted Gallo of three counts of distribution of cocaine and one count of importation of cocaine, but acquitted Gallo of conspiracy to distribute cocaine. Gallo moved for a new trial and/or to vacate the judgment as to the importation count. He claimed that the district court erred in giving the *Pinkerton* instruction and that the verdicts were inconsistent because the jury found Gallo guilty of importation while finding him not guilty of conspiracy.[6] The district court denied Gallo's motion.

> a co-conspirator committing a substantive offense, such as the importation of cocaine, in furtherance of a conspiracy is held to be the agent of the other conspirators and his acts can bind them and be attributed to them just as if they had committed the substantive offenses.
>
> In other words, if you find by proof beyond a reasonable doubt that (1) a conspiracy existed; (2) the Defendant was one of the Conspirators; (3) the act of importing cocaine into the United States was reasonably foreseeable and was done by any one or more co-conspirators other than the Defendant during the pendency of and in furtherance of such conspiracy, then those acts of the co-conspirators are attributable to the Defendant as if he himself had performed those acts. 1SR3-364-18-19.

[6] Gallo's argument that the verdicts are inconsistent is premised on the idea that the jury would have to find Gallo guilty of conspiracy (Count I) in order to find him guilty of importation (Count V) because the evidence shows that Gallo

At sentencing, Gallo advised the district court that the Colombian government had sent a diplomatic note to the United States formally protesting the *Pinkerton* jury instruction in Gallo's case. Gallo was unable to provide documentation of the protest at sentencing. The district court overruled his objection.[7] The district court sentenced Gallo to thirty years of imprisonment and five

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did not actually transport the cocaine into the United States himself. Therefore, Gallo argues, he could only have been found guilty of importation under the *Pinkerton* co-conspirator theory.

Upon review of the record, we find that the verdicts may be read as consistent because the jury could have found from the evidence that Gallo was involved in more than one conspiracy. We also note that it would make no difference in our analysis if the verdicts were inconsistent. *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984) (that a jury reaches what might be construed as inconsistent verdicts is not an adequate ground for reversal); *see United States v. Hope*, 901 F.2d 1013, 1020 n. 12 (11th Cir.1990), *cert. denied*, 498 U.S. 1041, 111 S.Ct. 713, 112 L.Ed.2d 702 (1991).

[7] Seven days after sentencing, Gallo filed Diplomatic Note E-1518 in which the Colombian Government advised the United States Department of State that it had received information that:

> [T]he trial judge, the Honorable James C. Paine, pursuant to the prosecution's request instructed the jury that it could find Mr. Gallo Chamorro guilty of the substantive offenses charged in the indictment under the "Pinkerton" theory of criminal liability. The Pinkerton theory, which is wholly vicarious in nature is not recognized by Colombia since, like U.S.C. Section 2, it has no comparable legal concept in the Colombian Criminal Code.
>
> By instructing the jury that it could find Mr. Gallo Chamorro guilty of the substantive crime charged under a theory of vicarious criminal liability, not recognized by Colombia, the trial judge violated the

years of supervised release on each count to run concurrently.

Gallo then filed this appeal, arguing that the district court erred in giving the *Pinkerton* instruction to the jury because co-conspirator liability based on the *Pinkerton* instruction equates to criminal liability based on 18 U.S.C. § 2, and therefore the instruction violated the specialty doctrine by ignoring an express prohibition of the extradition agreement.

II. STANDARD OF REVIEW

The district court's ruling that criminal liability based on the *Pinkerton* co-conspirator jury instruction is not the same as criminal liability for aiding and abetting, 18 U.S.C. § 2, is a legal conclusion. We review the district court's conclusions of law *de novo*. *Newell v. Prudential Ins. Co.*, 904 F.2d 644, 649 (11th Cir.1990).

III. ANALYSIS

A. The Doctrine of Specialty

We begin our analysis by examining the doctrine of specialty, or specialty doctrine, and determining what the doctrine requires under the facts of the case at hand.

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extradition Resolution, and other principles of international law.

. . . .

. . . The terms under which Mr. Gallo Chamorro's extradition was granted have not been complied with [sic] the Embassy requests that the appropriate actions be taken to reinstate his rights and comply with the terms of the extradition.

1SR3-381-2.

In *United States v. Rausher*, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886), the Supreme Court established the rule of law that the courts of this country will not try a defendant extradited from another country on the basis of a treaty obligation for a crime not listed in the treaty. *Id.* at 424, 7 S.Ct. at 243. This principle has been extended to bar prosecution for crimes for which, for whatever reason, extradition was not granted. *See United States v. Archbold-Newball*, 554 F.2d 665, 685 n. 21 (5th Cir.), *cert. denied*, 434 U.S. 1000, 98 S.Ct. 644, 54 L.Ed.2d 496 (1977) (citations omitted).[8]

In applying the doctrine of specialty, this court has found that:

> It is clear, however, that even as the specialty doctrine has been defined and broadened in this century, it has never been construed to permit foreign intrusion into the evidentiary or procedural rules of the requisition state, as distinguished from limiting the jurisdiction of domestic courts to "try or punish the fugitive for any crimes committed before the extradition, except the crimes for which he was extradited." Friedmann, Lissitzyn & Pugh; International Law 493 (1969). Where . . . a defendant is indicted and tried for the precise offense contained in the foreign extradition order . . . , the doctrine does not authorize us to disregard normal evidentiary rules followed by this forum.

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[8] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as precedent all decisions of the former Fifth Circuit Court of Appeals rendered prior to October 1, 1981.

Archbold-Newball, 554 F.2d at 685 (quoting *United States v. Flores*, 538 F.2d 939, 944 (2d Cir.1976)); *see United States v. Alvarez-Moreno*, 874 F.2d 1402, 1414 (11th Cir.1989), *cert. denied*, 494 U.S. 1032, 110 S.Ct. 1484, 108 L.Ed.2d 620 (1990) ("When a grand jury indicts a defendant, and the defendant is tried for the precise offense contained in the extradition order, the doctrine of specialty does not purport to regulate the scope of proof admissible in the judicial forum of the requisitioning state.").

Gallo's case is not unlike the situation faced by the Eighth Circuit in *United States v. Thirion*, 813 F.2d 146 (8th Cir.1987). In *Thirion*, the asylum country had extradited the defendant on several substantive charges, but specifically had denied extradition on a conspiracy charge. Over the defense's objection, the jury was instructed on co-conspirator liability under *Pinkerton* for the substantive charges. The Eighth Circuit held that the defendant's convictions on the substantive charges as a co-conspirator under *Pinkerton* did not violate the specialty doctrine because the defendant "was tried only for those crimes for which he was extradited." *Thirion*, 813 F.2d at 152-53. The court reasoned that because the doctrine of specialty does not alter existing rules of evidence or procedure, it could not prohibit giving the jury a *Pinkerton* instruction which permitted the government to establish the defendant's membership in a conspiracy as an evidentiary fact to prove guilt in the related substantive offenses. *Id.*

We find this reasoning persuasive. Gallo was tried only for the crimes for which he was extradited. The district court took great pains to eliminate all references to 18 U.S.C. § 2 from Gallo's indictments and did not instruct the jury on aiding and abetting. Because we find

that the *Pinkerton* jury instruction is not equivalent to a jury instruction on aiding and abetting, 18 U.S.C. § 2, we hold that the district court was well within its bounds of discretion in giving the *Pinkerton* instruction to the jury. In support of this conclusion, we find it necessary to more clearly distinguish the *Pinkerton* instruction from the principle of aiding and abetting found in 18 U.S.C. § 2.

B. Aiding and Abetting versus *Pinkerton* Co-Conspirator Liability

We agree with the district court that criminal liability for aiding and abetting under 18 U.S.C. § 2 is not the same as co-conspirator liability under *Pinkerton*. The Defendant argues that because aiding and abetting and *Pinkerton* co-conspirator liability are founded on the same principle of vicarious liability,[9] they are the same. However, in *Nye & Nissen v. United States*, 336 U.S. 613, 69 S.Ct. 766, 93 L.Ed. 919, the Supreme Court distinguished between these two principles of criminal liability:

> The rule of . . . [*Pinkerton*] does service where the conspiracy was one to commit offenses of the character described in the substantive counts. Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether

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[9] *See Pinkerton*, 328 U.S. at 647, 66 S.Ct. at 1184. In discussing the basis for co-conspirator liability for substantive offenses, the Court stated that "[t]he rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle." *Id.*

> or not there is a conspiracy . . . *Pinkerton v. United States* is narrow in its scope. Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing. The fact that a particular case might conceivably be submitted to the jury on either theory is irrelevant.

Id. at 620, 59 S.Ct. at 770.

Clearly, *Pinkerton* liability, which requires the defendant's participation in a conspiracy, is much narrower in scope than aiding and abetting. Although we agree that the extradition papers prohibited the use of 18 U.S.C. § 2 in a trying the Defendant, we find unpersuasive the Defendant's argument that the "*Pinkerton* doctrine is . . . a variant of 18 United States Code Section 2." Appellant's Br. at 12.

We now turn to the Defendant's argument that the doctrine of dual criminality prohibits trying the Defendant under any theory of vicarious criminal liability, including the *Pinkerton* theory.

C. The Doctrine of Dual Criminality

The doctrine of dual or double criminality is distinct from the doctrine of specialty.

> Double criminality refers to the characterization of the relator's criminal conduct insofar as it constitutes an offense under the laws of the respective states . . . 'Double criminality' is in effect a reciprocity requirement which is intended to ensure each of the respective states that they (and the relator) can rely on corresponding treatment, and that no state shall use

> its processes to surrender a person for conduct which it does not characterize as criminal.

United States v. Herbage, 850 F.2d 1463, 1465 (11th Cir.1988) (quoting M. Bassiouni, International Extradition: United States Law and Practice vol. 1, ch. 7, sec. 3, pp. 324-25 (2d rev. ed. Nov. 1987)). Gallo asserts that although "[i]n the lower court, all parties treated the issue as involving the rule of specialty . . . the concept that the country of Colombia was asserting was the concept of dual criminality." Appellant's Br. at 11. Gallo further argues that "[a]ny misuse of labeling does not detract from the substance of what was argued, namely that this instruction violated the agreement." *Id.* Gallo now argues on appeal that under the doctrine of dual criminality his convictions cannot stand because they are based on a theory of vicarious liability, namely *Pinkerton*, that Colombia does not recognize. We find, however, that because Gallo did not properly raise the issue of dual criminality before the district court, he was waived his right to raise it here.

To preserve an issue for appeal, a general objection or an objection on other grounds will not suffice. *United States v. Dennis*, 786 F.2d 1029, 1042 (11th Cir.1986), *cert. denied*, 481 U.S. 1037, 107 S.Ct. 1073, 95 L.Ed.2d 814 (1987). This court may entertain an argument not raised below if it involves a pure question of law and if refusal to consider it would result in a miscarriage of justice. *See Baumann v. Savers Federal Savings & Loan Assoc.*, 934 F.2d 1506, 1512 (11th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1936, 118 L.Ed.2d 543 (1992) (citations omitted). This court, however, will not make an exception "if additional facts would have been developed in the trial court had

the new theory been presented there." *Smith v. Horner,* 839 F.2d 1530, 1534-36 (11th Cir.1988) (quoting *Higginbotham v. Ford Motor Co.,* 540 F.2d 762, 768 n. 10 (5th Cir.1976)).

In this case, it is unclear from the record why Colombia extradited Gallo for the importation count. Gallo argues that Colombia extradited him only as a principal, however the government argues that Colombia extradited him for importation knowing that he was only vicariously liable for that count. Gallo responds in turn that Colombia does not recognize vicarious criminal liability. Unfortunately, we cannot find the answers to these questions in the record upon which we must rely. Had Gallo properly raised the theory of dual criminality in the district court, this factual dispute could have been more fully developed and perhaps reconciled. Thus, in cases such as this, where the record is incomplete, "judicial economy is served and prejudice is avoided by binding the parties to the facts presented and the theories argued below." *Horner,* 839 F.2d at 1536. Therefore, we decline to consider Gallo's dual criminality argument, and find that, based on the doctrine of specialty, the district court fully complied with the extradition agreement.

D. Diplomatic Note E-1518

In Gallo's motion for a new trial, he submitted for the first time Diplomatic Note E-1518, a note sent from the Colombian government to the United States Department of State protesting the district court's use of the *Pinkerton* theory in convicting Gallo for his substantive crimes on

the grounds that the theory is not recognized in Colombia. We find this note has no persuasive or precedential value in this case. Although extradition agreements and the specialty doctrine undeniably control the United States courts' jurisdiction over foreign defendants such as Gallo, these international principles of law cannot be "construed to permit foreign intrusion into the evidentiary or procedural rules of the requisitioning state." *United States v. Archbold-Newball*, 554 F.2d 665, 685 (5th Cir.), *cert. denied*, 434 U.S. 1000, 98 S.Ct. 644, 54 L.Ed.2d 496 (1977).

IV. CONCLUSION

Because we agree with the district court that criminal liability based on the *Pinkerton* instruction is not equivalent to criminal liability for aiding and abetting under 18 U.S.C. § 2, we find that the *Pinkerton* instruction did not violate the extradition agreement or the doctrine of specialty and WE AFFIRM.

AFFIRMED.

[EXTRADITION AGREEMENT]

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MINISTRY OF JUSTICE

RESOLUTION NUMBER **235** OF 19

[Rubberstamp: **SEPT 5 1990**]

Whereby the petition for reconsideration is decided as filed against Resolution No. 150 of July 3, 1990

THE PRESIDENT OF THE
REPUBLIC OF COLOMBIA

in the exercise of the faculties conferred upon him by the Legislative Decree 1860 of 1989, based on Book Five, Chapter IV of the Code of Criminal Procedure, and of Article 50 of the Contentious-Administrative Code, and

WHEREAS:

ORLANDO ARISTIDES NOVOA GUTIERREZ, Esquire, identified by Citizenship Id. Card No. 19,083,140 of Bogota, and by Professional Card No. 41090 of the Ministry of Justice, acting as attorney of Mister JOAQUIN OSWALDO GALLO CHAMORRO, filed a petition for reconsideration, within the legal deadline, against Resolution No. 150 of July 3, 1990.

The petitioner requests to have the aforementioned Resolution revoked, and that in lieu thereof the extradition of Mister JOAQUIN OSWALDO GALLO CHAMORRO be denied; ancillarily, he requests that his client's extradition be denied as to all counts filed against him by the authorities of the United States.

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To support his requests, attorney presents the following arguments:

That Mister JOAQUIN OSWALDO GALLO CHAMORRO was captured, by Colombian security bodies, before the provisional detention order was issued, for the purpose of extradition, by the Ministry of Justice, which implies that said procedure was illegal.

That the Colombian Government has ignored the provisions by the Council of State in regard to its March 23 and May 10, 1988 decisions, according to which, before the existence of the Extradition Treaty entered into with the United States in the year 1979, no other mechanism may be resorted to in order to regulate extraditions between the two countries. That what was expressed by the Council of State implies the impossibility of applying Decree 1860 of 1989 to the extradition arrangements being made with the United States, including those of Mister CHAMORRO. That the obligation of the Government was to denounce the Treaty, or to present it anew before the Congress, which has not been done.

[Rubberstamp by the Head of the Legal Office, Ministry of Justice, Republic of Colombia]

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RESOLUTION NUMBER 235 SHEET NUMBER ___

Sheet No. 2 of the Resolution whereby the petition for reconsideration is decided as filed against Resolution No. 150 of July 3, 1990

That it has not been fully shown that Mister OSWALDO GALLO CHAMORRO, presently detained in Colombia, is the same person against whom proceedings are being brought forward in the United States. He states that in INDICTMENT No. 88-301 CR-KEHOE, it is JACKIE, last name unknown, who is charged, and that in the INDICTMENT superseding the previous one it is JACKIE GALLO, without any statement or evidenciary element existing that would make it possible to infer that the accused is JOAQUIN OSWALDO GALLO CHAMORRO.

That in INDICTMENT No. 88-8125-CR PAINE (s) (s) (s), Mister JOAQUIN OSWALDO GALLO CHAMORRO, a.k.a. JOAQUIN GALLO, JACKIE GALLO and ROBERT ALARIO, is charged, but that this charging instrument is a superseding one, and it was issued on January 30, 1990, a date by which his client had already been detained, wherefore it is very likely that information obtained in Colombia was used, in order to include it in that indictment.

REQUEST FOR DISCOVERY: In order to clarify this aspect, the petitioner deems it necessary to request the Courts for a copy of the evidence found in the proceedings, whereby it could be established who the defendant is, as well as his description; in the case of INDICTMENT No. 88-8125 CR-PAINE (s) (s) (s), he asks that a copy be requested of the INDICTMENTS superseding the ones prior to the January 30, 1990 indictment, for the purpose of establishing who was the person charged in them.

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That Resolution No. 150 of 1990 violates the principle of double jeopardy by granting extradition in regard to all the counts filed against his client, by allowing one self-same act to be punished twice, which is not allowed by Colombian Legislation.

That it must be specified that Mister GALLO CHAMORRO, in the event he is extradited, must not be imposed a sentence longer than 30 years; that otherwise and taking into account the promise formulated by the United States in Verbal Note No. 206 of March 9, 1990, to the effect of not having to "serve a period of incarceration longer than 30 years," the provisions of Article 8, Letter b of Decree 1860 of 1989 would be violated, since it would allow the sentence to be longer, thus affecting the privileges that may exist in accordance to the penitenciary statutes applicable to the case.

That Article 40 of the Contentious-Administrative Code must be applied in the case of Mister GALLO CHAMORRO, since in this process over two months elapsed without the Government issuing a decision, from which it must be understood that the request made by the United States was denied, that is, that the extradition was not accepted.

That Mister GALLO CHAMORRO is not a narcoterrorist, and does not constitute a danger to the country, thus it is not necessary to extradite him.

[Rubberstamp by the Head of the Legal Office, Ministry of Justice, Republic of Colombia]

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RESOLUTION NUMBER 235 SHEET NUMBER ___

Sheet No. 3 of the Resolution whereby the petition for reconsideration is decided as filed against Resolution No. 150 of July 3, 1990

In regard to this resolution, the Government is of the opinion:

That the matters related to Mister JOAQUIN OSWALDO GALLO CHAMORRO's detention were decided by the Ministry of Justice, by the Resolution of July 3, 1990, reason why it is not possible to entertain that matter again, already closed and defined by that competent body.

On various occasions it has been stated that, although the Extradition Treaty of 1979, entered into between the United States and Colombia, is in force at the international level, its application is not possible, because a law does not exist which would incorpate the treaty in the country's Legislation. For this reason, in view of the absence of a statute that would regulate the extradition to the United States, the Decree 1860 of 1989 is applied.

It is not necessary to request any certification whatsoever on this aspect, since just as provided by Article 652 of the Code of Criminal Procedure, the

Ministry of Foreign Relations by means of Memorandum No. 271 of March 12 of the current year, expresed that the request for the extradition of Mister

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GALLO CHAMORRO must be addressed according to the provisions set forth in Decree 1860 of 1989, just as it indeed has occurred.

As to the identification it is necessary to indicate that the request for extradition included the description of the person wanted, and that furthermore a photocopy was attached thereunto of the driver's licenses issued in the State of Florida to Mister JOAQUIN GALLO and ROBERT ALARIO, whose photographs match; likewise, a photograph is attached taken of Mister GALLO CHAMORRO by the Metro Dade Police Department in Miami, Florida, on April 22, 1988.

The prosecutors who know the respective proceedings prepared a report on the facts, wherein it is clearly indicated that Mister GALLO CHAMORRO is the person being charged, and aspects are mentioned which so prove, such as the meetings sustained by the defendant with other persons who were part of the partnership in crime.

As may be observed, there is no doubt as to the identity of the party wanted for extradition, so it is not necessary to request the evidence the attorney asks for.

As to the double jeopardy matter, it is appropriate to analyze the counts thoroughly, keeping in mind the arguments presented by Mister GALLO CHAMORRO's attorney.

[Rubberstamp by the Head of the Legal Office, Ministry of Justice, Republic of Colombia]

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RESOLUTION NUMBER 235 SHEET NUMBER ___

Sheet No. 4 of the Resolution whereby the petition for reconsideration is decided as filed against Resolution No. 150 of July 3, 1990

In Count I of SUPERSEDING INDICTMENT No. 88-301-KEHOE (s), Mister GALLO is accused of conspiracy to import cocaine, with the intent to distribute, in contravention of of Title 21, Sections 846, 963 and of Title 18, Section 2 of the United States Code. In Charge I of the SUPERSEDING INDICTMENT No. 88-8125-CR-PAINE (s) (s) (s) Mister GALLO CHAMORRO is accused of conspiracy to distribute cocaine in violation of Section 846, Title 21, of the United States Code.

These associations according to the file took place in Miami, DADE AND PALM BEACH Counties [sic], in the South District of Florida, with the purpose of committing crimes related to narcotics trafficking, and in both proceedings Mister DANNY GALLO appears involved, in such a way that one cannot think of the existence of two parallel and separate associations, but of a single one.

Furthermore, according to Colombian Law it is not possible to accept the existence of one association for the

commission of each single kind of crime, but rather within the conspiracy to break the law, which in the case of narcotics trafficking is governed by Article 44 of Law 30 of 1986.

This leads us to conclude that the extradition may only be authorized for the Counts [sic] I of INDICTMENT No. 88-8125-CR-PAINE (s) (s) (s), which involves the conspiracy covering the longest period of time.

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In the aforementioned proceedings, the possession of cocaine, its importation and distribution are penalized in a separate fashion, in spite of the fact that these acts were carried out the same day. It is logical that in order to import and to distribute it is an indispensible requirement to possess, so if this event does not take place, it is impossible to carry out the other act.

The crime of trafficking in narcotics is contemplated in Article 33 of Law 30 of 1986, and it is characterized by any of these possibilities taking place: introducing into the country, taking out of the country, transporting, carrying with oneself, storing, preserving, selling, offering, acquiring, financing or supplying a dependency-producing drug. This statute provides for various acts in the commission of a crime, which is why it does not allow to accept the extradition for possession, importation and distribution of cocaine as separate crimes, since the same crime would be penalized twice.

In consequence, the extradition of Mister GALLO CHAMORRO shall only be authorized for those counts related to the distribution.

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RESOLUTION NUMBER 235 SHEET NUMBER ___

Sheet No. 5 of the Resolution whereby the petition for reconsideration is decided as filed against Resolution No. 150 of July 3, 1990

In Colombia the fact of carrying a weapon during the commission of a crime of narcotics trafficking is not considered independently as an crime, so the extradition on account of Count VIII of INDICTMENT No. 88-8125-CR-PAINE (s) (s) (s) must be denied, because it does not fulfill the double jeopardy requirement.

The [Colombian] Supreme Court of Justice has stated, on several occassions, that the violation of Title 18, Section 2, of the United States Code does not have an equivalent in Colombia, so therefore the extradition shall not be authorized, either, on account of this definition.

Decree 1860 of 1989, in Subdivision b of Article 8 sets forth the following limitation:

> "In no way shall the extradition of a citizen be granted if the requesting Government does not fully guarantee that he shall not be imposed a penalty depriving him of freedom for more than thirty (30) years."

In the Verbal Note No. 206 of March 9, 1990, the United States Government, in order to comply with the limitation transcribed above, expressed:

> "The fugitive shall not have to serve a period of encarceration for more than thirty (30) years for those crimes for which his extradition may be granted in accordance with this petition."

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The philosophy of Decree 1860 of 1989 indeed tends to prevent the extradited from being sentenced to a penalty that would deprive him of his freedom for more than 30 years; the wording of the commitment set forth in the Verbal Note is not clear and may indeed allow a sentence of more than 30 years, thus the period of incarceration shall not extend beyond this span of time, which, as asserted by the petitioner, would affect the guaranties set forth by the United States penintenciary statutes.

According to the foregoing, before the actual handing over of Mister GALLO CHAMORRO takes place, the United States Government must make its commitment clear, corroborating the the extradited shall not be sentenced to a penalty depriving him of freedom for more than thirty (30) years.

The administrative extradition, as set forth in Decree 1860 of 1989, is governed furthermore by the pertinent statutes of the [Colombian] Code of Criminal Procedure, and by the Contentious-Administrative Code. In this process a period is indeed provided within which the Government must decide, except the period set forth in Article 659 of the Code of

Criminal Procedure, which has been suspended on a provisional and partial basis.

On the other hand, Case Law has established that administrative silence serves as a means to exhaust administrative remedies, which does not take place unless there is no decision in regard to a claim filed against an administrative act; it does not so serve in regard to an initial petition, which is the case set forth by the attorney.

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RESOLUTION NUMBER 235 SHEET NUMBER ___

Sheet No. 6 of the Resolution whereby the petition for reconsideration is decided as filed against Resolution No. 150 of July 3, 1990

The Government has the obligation to analyze each request for extradition in the light of the statutes that govern that legal concept, in order to determine whether the necessary requirements are fulfilled or not. There are, thus, several aspects which play an important role in an extradition process, without the special classification that a person has being the only factor influencing the decision.

The request filed against Mister JOAQUIN OSWALDO GALLO CHAMORRO by the United States Government has been thoroughly studied, and it is considered to fulfill the mandatory requirements

for its viability, according to what has been expressed throughout this resolution.

On account of everything expressed herein, the President of the Republic of Colombia,

DOES RESOLVE:

ARTICLE ONE. To modify Article One of Executive Resolution No. 150 of July 3, 1990, which shall remain as

follows:

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To grant the extradition of Mister JOAQUIN OSWALDO GALLO CHAMORRO, requested by the Government of the United States, to be tried for:

A. INDICTMENT No. 88-301-CR-KEHOE (s), issued by the United States District Court, for the Southern District of Florida, for the following count:

COUNT III. For importation of cocaine, a contravention of Sections 952 (a) and 960 (a) (1) of Title 21 of the United States Code.

B. INDICTMENT No.88-8125-CR-PAINE (s) (s) (s), issued by the United States District Court, for the Southern District of Florida, for the following counts:

COUNT I. Conspiracy to distribute cocaine in the United States, in violation of Title 21, Section 846 of the United States Code.

COUNT III. Distribution of cocaine in violation of Title 21, Section 841 (a) (1), of the United States Code.

COUNT V. Distribution of cocaine in violation of Title 21, Section 841 (a) (1), of the United States Code.

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RESOLUTION NUMBER 235 SHEET NUMBER ___

Sheet No. 7 of the Resolution whereby the petition for reconsideration is decided as filed against Resolution No. 150 of July 3, 1990

COUNT VII. Distribution of cocaine in violation of Title 21, Section 841 (a) (1), of the United States Code.

ARTICLE TWO. To deny the extradition of Mister JOAQUIN OSWALDO GALLO CHAMORRO on Counts I and II of INDICTMENT

No. 88-301-CR-KEHOE (s), and on Counts II, IV, VI and VIII of INDICTMENT No. 88-8125-CR-PAINE (s) (s) (s), according to what was expressed in the expository portion of this Resolution.

ARTICLE THREE. To inform the requesting Government of this decision, through the Ministry of Foreign

Relations, indicating that the matter related to the limitation set forth in Letter b, Article 8 of Decree 1860 of 1989 must be clarified before actually handing over Mister

JOAQUIN OSWALDO GALLO CHAMORRO, just as specified in the expository portion of this resolution.

ARTICLE FOUR. This Resolution shall govern as of its date of publication, and the interested party or his

attorney must be notified personally, indicating that against the Resolution there is no valid appeal whatsoever.

Bottom half of Page 7 of original

PUBLISH, NOTIFY, INFORM AND ENFORCE THESE PRESENTS
Given in Bogota
[Rubberstamp: **SEPT. 5 1990**]

[Illegible signature]

THE MINISTER OF JUSTICE

[Signed: Jaime Giraldo A]
JAIME GIRALDO ANGEL

THE NATIONAL DEFENSE MINISTER

[Illegible signature]

Gral. OSCAR BOTERO RESTREPO
[Rubberstamp by the Head of the Legal Office, Ministry of Justice, Republic of Colombia]

Upper half of Page 8 of the original

RESOLUTION NUMBER 235 SHEET NUMBER ___

Sheet No. 8 of the Resolution whereby the petition for reconsideration is decided as filed against Resolution No. 150 of July 3, 1990

THE MINISTER OF AGRICULTURE,

[Signed: Ma del Rosario Sintes]

MARIA DEL ROSARIO SINTES RESTREPO

THE MINISTER OF HEALTH,

[Illegible signature]

ANTONIO NAVARRO WOLF

THE MINISTER OF NATIONAL EDUCATION,

[Illegible signature]

ALFONSO VALDIVIESO SARMIENTO

THE MINISTER OF COMMUNICATIONS,

[Illegible signature]
ALBERTO CASAS SANTAMARIA

[Rubberstamp:
MINISTRY OF JUSTICE
Legal Office
THIS IS A TRUE COPY OF ITS ORIGINAL
CHIEF]

PERSONAL NOTIFICATION

In Bogota, on the sixth (6th) day of the month of September of 1990, I personally notified ORLANDO ARISTIDES NOVOA GUTIERREZ, Esquire, identified by Citizenship Id. Card No. 19,083,140 of Bogota, and by Professional Card No. 41090, as to the contents of Resolution No. 235 of September 5, 1990. An authentic copy thereof is delivered. The interested party is informed that against this resolution there is no valid appeal. This is being signed by those parties participating herein.

NOTIFIED	NOTIFIER
[Illegible signature] ORLANDO ARISTIDES NOVOA GUTIERREZ c.c.	[Illegible signature] JORGE LUIS GUTIERREZ SOLANO LEGAL OFFICE ATTORNEY

PERSONAL NOTIFICATION

In Bogota, on the seventh (7th) day of the month of September of 1990, I personally notified JOAQUIN OSWALDO GALLO CHAMORRO, identified by Citizenship Id. Card No. 19,222,120 of Bogota, as to the contents of Resolution No. 235 of September 5, 1990. An authentic copy thereof is delivered. The interested party is informed that against this resolution there is no valid appeal. In witnes thereof this is being signed by those parties participating herein.

NOTIFIED	NOTIFIER
[Signed: JGallo] JOAQUIN OSWALDO GALLO CHAMORRO c.c.	[Illegible signature] LUIS ENRIQUE QUEJANO HERNANDEZ LEGAL OFFICE OFFICER

[DIPLOMATIC NOTE]

E-1060

The Embassy of Colombia presents its compliments to the Department of State and kindly requests its good offices for the investigation and resolution of the following matter.

The Colombian Government granted the extradition of Mr. Joaquin Oswaldo Gallo Chamorro, by resolution number 235 of September 5, 1990. In this resolution the Government clearly states the counts or charges whereby Mr. Gallo Chamorro may be prosecuted. In accordance with the resolution, Mr. Gallo Chamorro was only extradited because of, and hence, may only be prosecuted for the following counts:

a. – Indictment No. 88-301-CR-KEHOE (s) issued by the United States District Court, Southern District of Florida, for the following count:

COUNT III. – To import cocaine, in violation of Sections 952(a) and 960(a)(1) of Title 21 of the United States Code.

b. – Indictment No. 88-8121-CR-PAINE (s) (s) (s), issued by the United States District Court, Southern District of Florida, for the following counts:

COUNT I. – Conspiracy to distribute cocaine in the United States, in violation of Title 21, Section 846 of the U.S. Code.

COUNT III. – Distribution of cocaine in violation of Title 21, section 841(a)(1), of the United States Code.

COUNT V. – Distribution of cocaine in violation of Title 21, section 841(a)(1), of the United States Code.

COUNT VII. –Distribution of cocaine violation of Title 21, section 841(a)(1), of the United States Code.

Also the text of the resolution specifically states that "The Supreme Court of Justice has manifested on several occasions that the violation of Title 18, Section 2, of the United States Code does not has its equivalent in Colombia, and therefore it does not authorize, either, the extradition for this concept."

According to information received by the Embassy it appears that Mr. Gallo Chamorro shall also stand trial for violation (s) of Title 18, United States Code, Section 2, notwithstanding the interpretation of the Colombian Supreme Court of Justice quoted above.

The aforementioned count does not comply with the terms for which Mr. Gallo Chamorro's extradition was granted, given the express prohibition stated in this respect in the resolution number 235 granting the extradition by the Colombian Government.

The Embassy, therefore, requests that in this case the Department of State will seek that the terms of the extradition granted by the Government of Colombia will be complied with.

Embassy of Colombia
Washington, D.C. June 26, 1.991

[JURY INSTRUCTION]

If you find the defendant guilty of conspiracy as charged in Count 1, you may also find him guilty of the substantive offense charged in Count 5 of the indictment, that is the importation of cocaine, provided that you find that the essential elements of Count 5 as defined in that instruction have been established beyond a reasonable doubt, and provided that you also find beyond a reasonable doubt: First: That the offense as defined in the substantive count charged in Count 5 was committed by a coconspirator of the defendant pursuant to the conspiracy. Second, that the importation of cocaine was a reasonably foreseeable consequence of the conspiracy alleged in Count 1; and, three, that the defendant was a member of the conspiracy at the time the substantive offense charged in Count 5, that is the importation of cocaine, was committed.

Under the conditions just defined, a defendant found guilty of a conspiracy offense may be found guilty of a substantive count even though he, the defendant, did not participate in the importation of cocaine. The reason for this is that a coconspirator committing a substantive offense, such as the importation of cocaine, in furtherance of a conspiracy is held to be the agent of the other conspirators, and his acts can bind them and be attributed to them just as if they had committed the substantive offenses.

In other words, if you find by proof beyond a reasonable doubt that, one, the conspiracy existed; two, the defendant was one of the conspirators; and three, the act

of importing cocaine into the United States was reasonably foreseeable and was done by any one or more coconspirators other than the defendant during the pendency of and in furtherance of such conspiracy, then those acts of the coconspirators are attributable to the defendant as if he himself had performed those acts. This is true because, as stated earlier, a conspiracy is a kind of partnership in a crime so that under the law each conspirator is an agent or partner of every other conspirator, and each conspirator is bound by and responsible for the acts of every other conspirator which occur during and in furtherance of the unlawful scheme.

[DIPLOMATIC NOTE]

EMBAJADA DE COLOMBIA

WASHINGTON

E-1518

The Embassy of Colombia presents its compliments to the Department of State and wishes to refer to its Diplomatic Note No. E-1060 of June 26, 1991, in which it stated the position of the Government of Colombia in the case of Mr. Joaquin Oswaldo Gallo Chamorro.

The Embassy of Colombia has not received a reply to said Note, but has received information that the terms whereby Mr. Gallo's extradition was granted have been violated. As the Department of State is aware, on September 5, 1991, the Colombian Government by Resolution number 235 granted the extradition of Mr. Gallo-Chamorro. Resolution 235 does not allow the prosecution of Mr. Gallo Chamorro in the United States under title 18 U.S.C. section 2, (aiding and abetting), on the grounds that the Colombian Supreme Court has repeatedly held that 18 U.S.C. Section 2, does not have a comparable legal concept in Colombia.

Notwithstanding the clear mandate of Resolution 235, the trial judge, the Honorable James C. Paine, pursuant to the prosecutions' request, instructed the jury that it could find Mr. Gallo Chamorro guilty of the substantive offenses charged in the indictment under the "Pinkerton" theory of criminal liability. The Pinkerton theory, which is wholly vicarious in nature, is not recognized by Colombia since, like 18 U.S.C. Section 2, it has no comparable legal concept in the Colombian Criminal Code.

By instructing the jury that it could find Mr. Gallo-Chamorro guilty of the substantive crimes charged under a theory of vicarious criminal liability, not recognized by Colombia, the trial judge violated the extradition Resolution, and other principles of international law.

The Executive Branch of the United States Government agreed to abide by the terms and conditions set forth in Resolution 235. This agreement was breached when the jury was instructed on the Pinkerton theory of vicarious liability. Evidence of this transpires from some of the transcripts of the jury instructions, copies of which are attached to this Note.

This Embassy has received specific instructions from the Minister of Foreign Affairs to inform the Department of State that such action is a violation of the terms under which Mr. Gallo's extradition was granted and, hereby, objects such determination. The Embassy also reiterates the terms contained in its Note E-1060 of June 26, 1991 and respectfully requests that appropiate action should be taken to reinstate Mr. Gallo's rights in accordance with the terms under which his extradition was granted. The terms under which Mr. Gallo Chamorro's extradition was granted have not been complied with the Embassy requests that the appropiate actions be taken to reinstate his rights and comply with the terms of the extradition.

The Embassy of Colombia avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

[seal]

Embassy of Colombia

Washington D.C. October 1, 1991

FILED
JUL 21 1995
CLERK

No. 94-1905

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOAQUIN OSVALDO GALLO-CHAMORRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

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BEST AVAILABLE COPY

13 pp

QUESTION PRESENTED

Whether the district court exceeded the terms of petitioner's extradition, which prohibited petitioner's trial as an aider and abettor under 18 U.S.C. 2, when it instructed the jury that if it found petitioner was a member of a conspiracy, it could convict petitioner for the reasonably foreseeable substantive offenses of his co-conspirators.

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In the Supreme Court of the United States

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JOAQUIN OSVALDO GALLO-CHAMORRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 48 F.3d 502.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1995. The petition for a writ of certiorari was filed on May 19, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on three counts of distribution of

cocaine, in violation of 21 U.S.C. 841(a)(1), and one count of importation of cocaine, in violation of 21 U.S.C. 960. He was sentenced to 30 years' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1-16.

1. The evidence at trial showed that in 1987 and 1988, petitioner, a Colombian national, orchestrated the importation of several 400- to 500-kilogram loads of cocaine from Colombia into the United States. Petitioner distributed the cocaine from a residence located in Palm Beach County, Florida. In April 1988, petitioner coordinated the importation of 500 kilograms of cocaine into the United States. Law enforcement authorities intercepted that load and arrested petitioner's co-conspirators. Petitioner subsequently became a fugitive and returned to Colombia. Gov't C.A. Br. 7-13.

2. On January 9, 1990, petitioner was arrested in Bogotá, Colombia. On January 11, the United States requested petitioner's provisional arrest. Two months later, the United States submitted Diplomatic Note 206 to the Republic of Colombia, requesting that petitioner be extradited to the United States to stand trial for several narcotics trafficking crimes, including violations of the aiding-and-abetting statute, 18 U.S.C. 2. Pet. App. 2.

On September 5, 1990, the Colombian government extradited petitioner to the United States for trial on one count of importation of cocaine, in violation of 21 U.S.C. 952(a) and 960(a)(1), one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and three counts of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 3, 28-29. The extradition document denied extradition on all other counts. It specifically provided that "[t]he [Colom-

bian] Supreme Court of Justice has stated, on several occasions, that the violation of Title 18, Section 2, of the United States Code does not have an equivalent in Colombia, so therefore the extradition shall not be authorized, either, on account of this definition." *Id.* at 25.

3. Before his trial commenced, petitioner filed a Motion to Enforce Rule of Specialty, arguing that he could not be prosecuted for any offense under 18 U.S.C. 2. The district court granted petitioner's motion and, accordingly, the court redacted all mention of Section 2 from the indictment submitted to the jury and omitted the standard aiding-and-abetting instruction when it charged the jury. Pet. App. 4-5.

Over petitioner's objection, however, the district court gave the jury a *Pinkerton* instruction on the count charging importation of cocaine. See *Pinkerton* v. *United States*, 328 U.S. 640 (1946). That instruction told the jury that "[a] Defendant found guilty of a conspiracy offense may be found guilty of a substantive count even though he, the Defendant, did not participate in the importation of cocaine." Pet. App. 6 n.5. Under the instruction, the jury was required to convict if it made the following findings beyond a reasonable doubt:

> (1) a conspiracy existed; (2) [petitioner] was one of the Conspirators; (3) the act of importing cocaine into the United States was reasonably foreseeable and was done by any one or more co-conspirators other than [petitioner] during the pendency of and in furtherance of such conspiracy.

Id. at 7 n.5.

Petitioner objected to the *Pinkerton* instruction on the ground that it violated the terms of his extradition. He argued that Colombia had extradited him

only to be tried as a principal, not as an aider and abettor, and that *Pinkerton* provides for a constructive theory of liability to which Colombia would have objected. The district court overruled that objection, finding that "[a]iding and abetting is not the same as conspiracy, and *Pinkerton* is based on conspiracy." Pet. App. 6.

During deliberations, the jury inquired whether the *Pinkerton* instruction applied to the importation count or to all counts. Over petitioner's objection, the district court instructed the jury that the *Pinkerton* instruction applied to the three counts charging petitioner with distribution of cocaine, as well as the importation count. Pet. App. 6-7. The jury acquitted petitioner on the conspiracy count, but convicted him on the importation count and the three distribution counts. *Id.* at 7.

At sentencing, petitioner advised the district court that the Colombian government had sent a diplomatic note to the United States formally protesting the *Pinkerton* instruction given to petitioner's jury. The district court declined to take action on petitioner's objection. Pet. App. 8.

Seven days after sentencing, petitioner filed with the district court Diplomatic Note E-1518 in which the Colombian government informed the United States Department of State that "[t]he Pinkerton theory, which is wholly vicarious in nature, is not recognized by Colombia since, like 18 U.S.C. Section 2, it has no comparable legal concept in the Colombian Criminal Code." Pet. App. 37. Diplomatic Note E-1518 protested that "[b]y instructing the jury that it could find [petitioner] guilty of the substantive crimes charged under a theory of vicarious criminal liability, not recognized by Colombia, the trial judge

violated the extradition Resolution, and other principles of international law." *Id.* at 38.

4. The court of appeals affirmed. Pet. App. 1-16. It rejected petitioner's contention that the *Pinkerton* instruction allowed him to be prosecuted on a crime for which he had not been extradited and thus violated the doctrine of specialty. Relying on this Court's decision in *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949), the court concluded that "criminal liability for aiding and abetting under 18 U.S.C. § 2 is not the same as co-conspirator liability under *Pinkerton*." Pet. App. 12. Accordingly, the court held that the extradition decree's prohibition on petitioner's prosecution under Section 2 did not bar the submission of the substantive counts of the indictment to the jury on a *Pinkerton* theory.

The court of appeals also held that Diplomatic Note E-1518, in which the Colombian government protested the use of the *Pinkerton* instruction at petitioner's trial, had "no persuasive or precedential value in this case." Pet. App. 16. The court explained that, "[a]lthough extradition agreements and the specialty doctrine undeniably control the United States courts' jurisdiction over foreign defendants such as [petitioner], these international principles of law cannot be 'construed to permit foreign intrusion into the evidentiary or procedural rules of the requisitioning state.'" *Ibid.* (quoting *United States* v. *Archbold-Newball*, 554 F.2d 665, 685 (5th Cir.), cert. denied, 434 U.S. 1000 (1977)).[1]

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[1] The court of appeals declined to consider petitioner's contention that the doctrine of dual criminality barred his prosecution because petitioner had not raised that claim in the district court. Pet. App. 14-15.

ARGUMENT

Petitioner renews his contention (Pet. 12-21) that the district court's *Pinkerton* instruction violated the terms of his extradition from Colombia and that the rule of specialty therefore requires reversal of his convictions. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

The rule of specialty provides that an extradited person is subject to prosecution in the requesting country only for those offenses for which he was extradited. See *United States* v. *Rauscher*, 119 U.S. 407, 419 (1886); *United States* v. *Herbage*, 850 F.2d 1463, 1465 (11th Cir. 1988), cert. denied, 489 U.S. 1027 (1989); *Shapiro* v. *Ferrandina*, 478 F.2d 894, 905 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973); 1 Restatement (Third) of Foreign Relations Law of the United States § 477, at 578 (1987).[2] In this case, the district court adhered strictly to the rule. Colombia extradited petitioner for trial on five specified charges: one

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[2] Petitioner was not extradited pursuant to the treaty between Colombia and the United States, because the Colombian Supreme Court has held unconstitutional the Colombian law implementing the treaty. Instead, petitioner was extradited under Decree Number 1860, which was issued by the President of Colombia in 1989. Pet. App. 3 n.1. In the absence of an applicable treaty provision, the decision whether to return petitioner to Colombia because of a violation of Colombian or international law "is a matter for the Executive Branch." *United States* v. *Alvarez-Machain*, 504 U.S. 655, 669 (1992). Thus, although the Republic of Colombia is entitled to assert a violation of the rule of specialty, it is not clear that, in the absence of an applicable treaty, petitioner has standing to raise a violation of the rule. See *id.* at 667.

count of importation of cocaine, in violation of 21 U.S.C. 952(a) and 960(a)(1), one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and three counts of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner was tried only on those charges. Moreover, the district court complied with the provision of the extradition order forbidding petitioner's trial for aiding and abetting under 18 U.S.C. 2. In accordance with that provision, the court redacted all mention of Section 2 from the indictment and declined the government's request to instruct the jury on aiding and abetting.

Contrary to petitioner's contention, the district court's *Pinkerton* instruction did not exceed the terms of his extradition. The extradition decree does not forbid the use of a *Pinkerton* instruction, and the *Pinkerton* instruction did not add any counts to the indictment or permit petitioner's conviction on any offense for which he was not extradited. The instruction merely explained to the jury that petitioner could be found guilty on the substantive counts for which he was extradited if the jury found that he participated in the conspiracy offense for which he was also extradited and that the substantive offenses were reasonably foreseeable acts of his co-conspirators. The decision below accords with the decision of the only other court of appeals that has considered a similar issue. See *United States* v. *Thirion*, 813 F.2d 146, 152-153 (8th Cir. 1987) (rejecting claim that giving of *Pinkerton* instruction violated rule of specialty when extraditing country barred the defendant's trial on conspiracy charge).

Nor is there merit to petitioner's implicit contention (see Pet. 18) that the extradition decree's prohibition on trying petitioner for aiding and

abetting under 18 U.S.C. 2 precluded the submission to the jury of the counts on which he had been extradited on a *Pinkerton* theory. As the court of appeals concluded, liability for the reasonably foreseeable acts of a co-conspirator under *Pinkerton* is not the same as liability as an aider and abettor under Section 2. As this Court has explained,

> [t]he rule of [*Pinkerton*] does service where the conspiracy was one to commit offenses of the character described in the substantive counts. Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy. * * * *Pinkerton* v. *United States* is narrow in its scope. Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing.

Nye & Nissen, 336 U.S. at 620. In light of that analysis, Columbia's refusal to extradite petitioner for any offense under Section 2 did not preclude the district court from giving the jury a *Pinkerton* instruction.[3]

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[3] To the extent petitioner can be understood to argue (see Pet. 12-17) that the *Pinkerton* doctrine is unconstitutional for lack of a statutory basis, that contention does not merit this Court's review. The *Pinkerton* doctrine is a well-established feature of criminal law (see, *e.g.*, *United States* v. *Vario*, 943 F.2d 236, 240 (2d Cir. 1991) (*Pinkerton* liability is a "fundamental tenet of the law of conspiracy"), cert. denied, 502 U.S. 1036 (1992)) that does not warrant this Court's reexamination. In any event, petitioner failed to object to the *Pinkerton* instruction at trial on the ground of its unconstitutionality, and the district court's use of the instruction was not plain error. See *United States* v. *Olano*, 113 S. Ct. 1770 (1993).

Finally, petitioner suggests (Pet. 19-20) that the district court should have granted him relief after the Republic of Colombia sent Diplomatic Note E-1518, which protested the use of a *Pinkerton* instruction at petitioner's trial. In the absence of any restriction in an extradition treaty or the extradition decree itself, however, the law of the United States governs the application of the rule of specialty in this country's courts. See *United States* v. *Abello-Silva*, 948 F.2d 1168, 1174 (10th Cir. 1991), cert. denied, 113 S. Ct. 107 (1992). Thus, as the court of appeals concluded, Colombia's Diplomatic Note E-1518 has no bearing on the question whether the *Pinkerton* instruction violated the rule of specialty. Instead, it raises only a question of international relations within the province of the Executive Branch.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1995